ER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FORM FOR USE IN APPLICATIONS FOR HABEAS CORPUS UNDER 28 U.S.C. § 2254
(eff. 12/1/04)

JOSE NUNEZ DZ-9081 PETITIONER
(Full Name) (Include name under which you were convicted)

vs. Case No. 08-1164
(Supplied by the Court)

JOHN THOMAS, Superintendent, SCI Chester RESPONDENT
(Name of Warden, Superintendent, Jailor, or authorized person having custody of petitioner)

and

THE DISTRICT ATTORNEY OF THE COUNTY OF Philadelphia

and

THE ATTORNEY GENERAL OF THE STATE OF Pennsylvania
ADDITIONAL RESPONDENT

Jose Nunez DZ-9081
Name Prison Number

State Correctional Institution at Chester, Pennsylvania
Place of Confinement

(If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

INSTRUCTIONS–READ CAREFULLY

1. You must include all potential claims and supporting facts for which you might desire to seek review because a second or successive habeas corpus petition cannot be filed except under very specific and rare circumstances requiring certification by the Third Circuit Court of Appeals as set forth in instruction # 13.

2. Your habeas corpus petition must be filed within the 1-year statute of limitations time limit set forth in 28 U.S.C. §2244(d)(1). (There are limited circumstances in which the petition may be amended, within the one-year time period, to add additional claims or facts, see Federal Rules of

Civil Procedure 15; or amended after the one-year period expires, in order to clarify or amplify claims which were timely presented, see United States v. Thomas, 221 F. 3d 430 (3d Cir.2000.)

3. Any false statement of a material fact in your petition, in a motion for leave to proceed in forma pauperis, or in any other motion you file in this case may serve as the basis for prosecution and conviction for perjury.

4. This petition must be typewritten, printed, or legibly handwritten and signed by you as the petitioner or by your representative on Page 11. You should answer all questions concisely in the proper space of the petition. If you need more room to answer any question, you may write on the reverse blank sides of the petition.

5. You may not attach additional pages to the petition. You do not have to list or cite the cases or law that you are relying on. If you do want to cite the cases and law you are relying on and make legal arguments, you should do so in a separate concise brief or memorandum which should be filed along with the petition.

6. When you file your petition, you must include a filing fee of $5.00. If you cannot pay the full filing fee, you must request permission to proceed in forma pauperis as explained in instruction # 8.

7. Your petition will be filed if you have followed these instructions and it is in proper order.

8. To request permission to proceed in forma pauperis without paying the full filing fee, you must completely fill out pages 12 through 18 of the petition. You should answer all questions and sign where indicated on Pages 12 and 18. You should see to it that an authorized prison official completes the certification on Page 19. You must prove that you cannot pay the full filing fee and other costs because of poverty and a discharge in bankruptcy will not excuse you from this requirement. The Court will let you know if you may proceed in forma pauperis.

9. Only final judgments entered by one state court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

10. As required by 28 U.S.C. § 2254(b)(1), you must have exhausted all claims that you are making in your petition. This means that every claim must have been presented to each level of the state courts. If you file a petition that contains claims that are not exhausted, the federal court will dismiss your petition. 28 U.S.C. § 2254(b)(2) provides that if it is perfectly clear that no colorable claims are presented, the federal court can also deny your petition on the merits.

11. As required by 28 U.S.C. § 2254(e)(1), a federal court, when considering your habeas corpus petition, must deem as correct a determination of fact made by a state court unless you rebut the presumption of correctness by clear and convincing evidence. Under 28 U.S.C. § 2254(e)(2), if

you have failed to develop the factual basis of a claim in state court proceedings, a federal court cannot hold an evidentiary hearing on that claim unless you show that:

(i) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the U.S. Supreme Court, that was previously unavailable,
or
(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence.
You must also show that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found you guilty of the offense in question.

12. As required by 28 U.S.C. § 2244(b)(1), a federal court must dismiss any claim in a second or successive habeas corpus petition that *was* presented in a prior habeas corpus petition.

13. As required by 28 U.S.C. § 2244(b)(2), a federal court must dismiss any claim in a second or successive habeas corpus petition that *was not* presented in a prior habeas corpus petition unless you show:

(A) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the U.S. Supreme Court, that was previously unavailable;
or
(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence, and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found you guilty of the offense in question.

Before such a second or successive petition may be filed in the district court, however, the petitioner must move the court of appeals for an Order authorizing the district court to consider the petition. Petitioner's motion for such an Order must be determined by a three judge panel of the court of appeals, which must grant or deny the motion within 30 days. The court of appeals may grant the motion only if it determines that the petition makes a prima facie showing that it satisfies either (A) or (B) above.

14. 28 U.S.C. § 2254(i) provides that ineffectiveness of counsel during post-conviction, habeas corpus and P.C.R.A. proceedings in state or federal court may not be grounds for relief in your petition.

15. When the petition is fully completed, the **original and four** copies must be mailed to the **Clerk of the United States District Court, Room 2609, 601 Market Street, Philadelphia, PA 19106.** You must return all pages, including these instructions.

PETITION

1. (a) Name and location of court which entered the judgment of conviction under attack: Court of Common Pleas of Philadelphia County, Criminal Justice Center 1301 Filbert street, Philadelphia, p PA. 19107

(b) Name of Prosecutor: Jude Conroy, Esquire, Asst. District Attorney

(c) Prosecution conducted by District Attorney's Office of Philadelphia County

2. (a) Date of Judgment of conviction: April 19, 1999

(b) Indictment number or numbers: 902 1/5, 4/5, 5/5

Term: January 1997 Criminal Case Number: 0902

3. Length of sentence: 10-20 years Sentencing Judge: Robert A. Latrone

4. Nature of offense or offenses for which you were convicted: Third Degree Murder, possession of an instrument of crime, recklessly endangering anotther person. (REAP)

5. What was your plea? (Check one)
(a) Not guilty (x) (b) Guilty ( ) (c) Nolo contendere ( )

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. **If you pleaded not guilty**, what kind of trial?: (Check one) (a) Jury ( ) (b) Judge only (x)

7. Did you testify at the trial? Yes ( ) No (x)

8. Did you appeal from the judgment of conviction? Yes (x) No ( )

9. If you did appeal, answer the following:

(a) Name of court: Superior Court of Pennsylvania, Philadelphia District

(b) Result: Affirmed

(c) Date of result and citation, if known: November 9, 2000 No. 2605 EDA 1999

(d) Grounds raised: Insufficient Evidence, Ineffectiveness of Counsel for failing to introduce character witnesses, failing to call Angel Vasquez or Adrian Torres as witnesses and failing to call petitioner as a witness.

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court: Supreme Court of Pennsylvania

(2) Result: Allowance of Appeal denied

(3) Date of result and citation, if known: May 14, 2001 No. 728 EAL 200

(4) Grounds raised: Same as Superior Court issues listed at 9(d)

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court: ________

(2) Result: ________

(3) Date of result and citation, if known: ________

(4) Grounds raised: ________

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes (x) No ( )

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of Court: Court of Common Pleas of Philadelphia county

(2) Nature of proceeding: Post Conviction Collateral Relief (PCRA) Petition.

(3) Grounds raised: 1.)failing to prestent any defense, including failing to call Adrian Torres or Angel Vasquez as Witnesses; 2.) failing to present the testimony of Lisa Tomessetti and Tracy Cassolero 3.) failing to present evidence of broken bottles used by victim's friends 4.) failing to move to suppress petitioner's statement to the police; 5.) failing to suppress the coat introduced at trial, and failing to use bloo

(4) Did you receive an evidentiary hearing on your petition, application or motion? (Cont. at 6

Yes ( ) No (x)

(5) Result: Dismissed

(6) Date of result: January 17, 2003

(7) Did you appeal the result to a higher court? Yes (x) No ( )

Court Name(s) Superior Court of Pennsylvania, Philadelphia disrict

Result(s) Reversed and Remanded for appointment of counsel to ammend petition

Result Date(s) January 6, 2005

(b) As to any second petition, application or motion give the same information:

(1) Name of Court: Court of Common Pleas of Phila. County

(2) Nature of proceeding: PCRA petition

(3) Grounds raised: Ineffectiveness of Appellate counsel for failing to raise claim involving a motion court error where the motion court ruled that the Defendant's character witnesses who would testify only as to the Defendant's peacfulness could be cross-examined as to the defendant's prior drug trafficking conviction, thus preventing the Defendant from having a fair trial and due process.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes (x) No ( )

(5) Result: Denied

11(a)(3) Continued

evidence to prove that petitioner suffered a "defense injury" 6.) failing to move for a lineup identification; 7.) failing to capitalize on the contradictions ind the record for the inpeachment of Commonwealth witnesses; 8.) failing to prevent petitioner's prior bad acts from becoming an issue at trial; 9.) failing to establish that the gun found was not tested for prints of tested for the blood that was on it; and 10.) failing to investigate or present other defenses

(6) Date of result: July 6, 2005

(7) Did you appeal the result to a higher court? Yes (x) No ( )

Court Name(s) Superior Court of Pennsylvania, Philadelphia district

Result(s) Affirmed

Result Date(s) September 8, 2006

(c) As to any third petition, application or motion give the same information:

(1) Name of Court: ______

(2) Nature of proceeding: ______

(3) Grounds raised: ______

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No (x)

(5) Result: ______

(6) Date of result: ______

(7) Did you appeal the result to a higher court? Yes ( ) No ( )

Court Name(s) ______

Result(s) ______

Result Date(s) ______

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held unlawfully. Give specific facts supporting each ground.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

For information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted all your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, (where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim).
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, (where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim).
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: Petitioner was denied his 14th Amendment right to due process and equal protection under the law when he was convicted of murder in the third degree where the evidence was insufficient to sustain the verdict.

Supporting FACTS (state *briefly* without citing cases or law):

The Commonwealth failed to prove beyond a reasonable doubt that the petitioner committed homicide with the require malicious aforethought require for the crime of murder. The alleged threatening comment made by the petitioner where based on highly questionable inconsistant testimony. There was accurate evidence presented that prove that He could have had genuine fear for his life and his friends negating the malice element.

B. Ground two: Petitioner was denied his 6th Amendment right to Counsel when trial counsel provided ineffective assistance by failing to call Angel Vasquez and Adrian Torres as witnesses at trial.

Supporting FACTS (state *briefly* without citing cases or law):

Adrian Torres and Angel Vasquez were both present at the Travelodge Hotel with Mr. Nunez at the time of the shooting. Both of them were available as witnesses which could rebut the Commonwealh's claim of threatening statements allegedly made by the petitioner. They also could testify that they were injured in this altercation initiated by the victim's group

C. Ground three: Petitioner was denied his 14th Amendment right to duue process and equal protection under the law when the state courts ruled that a defense character witness could be cross-examined about past drug sale conviction when the defense proffered witness as to petioner's peacefulness

Supporting FACTS (state *briefly* without citing cases or law):

Pennsylvania Legislation does not consider drug trafficing a "Violent offense" therefore it could not be used to rebut the character witness's assertion that the petitioner was not a peaceful person. With out being able to present his characher witnesses, petitioner was unable to attack the malicious aforethought element of the crime of murder thereby prejudicing him greatly.

D. Ground four:

Supporting FACTS (state *briefly* without citing cases or law):

____

____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

____

____

____

____

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ( ) No ( )

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing:______________________

(b) At arraignment and plea:______________________

(c) At trial: Louis Savino, Jr. , Esquire

(d) At sentencing: Louis Savino, Jr., Esquire

(e) On appeal: Mitchell Scott Strutin, Esquire
Suite 936 , One Penn Center,
1617 JFK Blvd. Phila., Pa 19103

(f) In any post-conviction proceeding: David Rudenstein, Esquire
9411 Evans Street, Phila, Pa. 19115

____

(g) On appeal from any adverse ruling in a post-conviction proceeding :__________

____

____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes (x) No ( )

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes ( ) No (x)

(a) If so, give name and location of court which imposed sentence to be served in the future:

____

____

(b) And give date and length of sentence to be served in the future: __________

____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes ( ) No ( )

I declare under penalty of perjury that the foregoing is true and correct.

Executed on__________________ ______________________________

Date

Petitioner's Signature or
Signature of Petitioner's Representative

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

____

Signature of Attorney (if any)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSE NUNEZ
Petitioner

V.

JOHN THOMAS, Superintendent
SCI Chester
And
LYNN ABRAHAM, District Attorney
of Philadelphia County
And
Attorney General of the State of Pennsylvania

Civil Action

Case No. __________

MEMORANDUM OF LAW IN SUPPRORT OF PETITION FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254

I. Introduction

Petitioner, Jose Nunez, was convicted of third-degree murder, recklessly endangering a person and possessing an instrument of crime, and imprisoned for 10 to 20 years in violation of a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." _Patterson v. New York_, 432 U.S. 197, 202, 97 S.Ct. 2319, 53 L.Ed. 2d 281 (1977). That fundamental principle, over which the Commonwealth ran roughshod in the prosecution of Jose Nunez, is that a person may be convicted only for what he has done, not for who he is.

No rule is more deeply rooted, or indeed essential, to the preservation of freedom and democracy in a nation of diverse peoples which tolerates, and indeed celebrates, differences in religion, race and ethnicity, as well as class, wealth, personality and even morals. Thus, no federal or state jurisdiction permits a defendant to be convicted because of his alleged "bad character." The reasons may have been most eloquently stated some 160 years ago in People v. White, 24 Wend. 520, 574, 1840 WL 3642 (N.Y. 1840):

> The rule and practice of our law in relation to evidence of character rest on the deepest principles of truth and justice. The protection of the law is due alike to the righteous and the unrighteous. The sun of justice shines alike for the evil and the good, the just and the unjust. Crime must be proved, not presumed; on the contrary, the most vicious is presumed innocent until proven guilty. The admission of the contrary rule, even in any degree, would open a door not only to direct oppression of those who are vicious because they are ignorant and weak, but even to the operation of prejudices as to religion, politics, character, professions, manners, upon the minds of honest and well intentioned jurors.

In the present case, the sole issue should have been whether Jose Nunez possessed the malice aforethought required for the crime of murder when he shot and killed William Impagliazzo during a drunken New Years day melee at a South Philadelphia hotel. Instead Mr. Nunez was painted as a trouble-maker and his victim as an innocent responsible participant in a New Year's party, predicated on the fact that he possessed a gun. Shooting a gun off at the turn of the new year has long been a practice for many inner-city residents. Mr. Nunez most likely had his gun for that purpose rather than to start trouble wherever he went.

The prosecution knew in advance, of course, that under Pennsylvania's statutory scheme, in order to succeed on the murder conviction, they needed to present Mr. Nunez as someone who was cold-hearted and capable of maliciously killing someone without any provocation. So the Commonwealth painted Mr. Nunez as a "bad man" based on his possession of a gun and his alleged combative statements quoted by severely intoxicated under-aged teenagers. Aside from these assertions presented at trial but not mentioned in their initial statements, the evidence presented shows Mr. Nunez and his friends greatly outnumbered and in a violent confrontation initiated by the victim and his friends. In light of the circumstances in its entirety, the trial court should have found that Mr. Nunez acted out of the heat of the moment and committed voluntary manslaughter rather than third-degree murder.

The critical issue in this case: did Jose Nunez shoot Mr. Impagliazzo out of delusional fear of imminent harm, as contended by the defense, or out of anger and resentment, as argued by the prosecution? The Trial Court erred in its evaluation of the facts presented. It was presented at trial that the commotion escalated to melee, in which the petitioner and his four friends were engaged with the other larger group of under-aged intoxicated teens. There was physical evidence of broken bottles presented which defense counsel argued were used in the altercation against Mr. Nunez and his friends. There was blood found in the room into which Mr. Nunez and his friends retreated. And when police arrived Mr. Nunez and his friends all requested medical attention. In addition, it was admitted on record by a Commonwealth witness that the victim's friends initiated the altercation.

The trial court in weighing the totality of the circumstances and evidence presented could not have reasonably determined beyond a shadow of doubt that Mr. Nunez committed homicide without the legal justification, excuse or mitigation constituting the malicious intent required for the crime of murder. The facts presented supported the imperfect self-defense, which would have called for a conviction on voluntary manslaughter. By the end of the trial, Mr. Nunez had been thoroughly vilified and caricatured as a trouble making, cold hearted, vicious and very "bad man" whose affirmative defense of imperfect self-defense constituted nothing more than an attempt to avoid responsibility for his actions.

We will demonstrate below that the Trial Court convicted Mr. Nunez of murder in the third-degree in violation of his 14th Amendment right to due process and equal protection under the law because the evidence was insufficient to support the verdict.

There were also a number of other serious errors of constitutional dimensions which, considered individually or collectively, directly implicate the integrity of the trial process and the guilty verdict. These errors include: (1) the state court ruling that a defense character witness could be cross-examined about the defendant's past drug trafficking conviction even though the defendant had proffered good character in the form of peacefulness only and where a prior drug trafficking conviction should not be held to rebut that trait of character. (2) ineffectiveness of counsel in failing to present at trial available testimony of Adrian Torres and Angel Vasquez.

The state courts unreasonably rejected all of the constitutional claims. The state courts further erred in denying Mr. Nunez a hearing on the claims that required factual determinations. Moreover, while each of the errors caused substantial harm to Mr. Nunez, the cumulative prejudicial and re-enforcing impact of the errors was overwhelming. The state courts improperly ignored the cumulative effect of these errors.

Mr. Nunez was deprived of a fair determination of his imperfect self-defense: he was convicted not because he knew the wrongfulness of his acts, but instead because he was found to be a "bad" person. It is respectfully submitted that a conviction so flagrantly violative of the constitutional principles of due process, the presumption of innocence, and the right to a fair trial simply cannot be allowed to stand.

II. Statement of the Case

A. Statement of the Facts

On December 31, 1996, Mr. Nunez and four of his friends were invited to the Travelodge Hotel at 20th Street ant Penrose Avenue in South Philadelphia by Lisa Tomesetti, Tracy Cassolaro, and their three friends. Upon Mr. Nunez's arrival at the Hotel, he and his friends were met in the lobby by Ms. Tomesetti and one of her friends. The group proceeded to the 5th floor where the young ladies had rented two adjoining rooms (513 and 514) to celebrate the new year.

As the petitioner and his group consisting of four guys and two girls exited the elevator on the 5th floor they made their way to room 513. (N.T. 4/13/99, pgs. 98-99) At that point, a commotion erupted between some members of Mr. Nunez 's group and a group of teens participating in a under-aged new year's drinking party. The commotion escalated to melee, in which Mr. Nunez and his friends were engaged with the larger group. (N.T. 4/12/99, pgs. 93, 129, N.T. 4/13/99, pgs. 17,21,79, N.T. 4/14/99, pgs. 19-20) Mr. Nunez and his friends were out numbered three to one by the group of intoxicated teens armed with beer bottles. It was not until, Mr. Nunez's friends were being badly beaten and he himself sustained an injury from a beer bottle, that he fired two shots in the direction of the crowd in fear of his and his friend's safety. (N.T. 4/12/99, pg. 95) Tragically one bullet struck the victim, William Impagliazzo fatally wounding him. Mr. Nunez and his friends retreated to the safety of room 513 until police arrived on the scene, at which time he asked for medical attention for himself and his injured friends. (N.T. 4/12/99, pp39, line 5-6) Mr. Nunez was arrested and subsequently charged with murder, possession of an instrument of crime, recklessly endangering another person and related offenses.

B. Trial Court Proceedings

Mr. Nunez was represented by Louis T. Savino Esquire, during the trial and sentencing phases of the judicial procedure. He waived his right to a jury trial and was tried before the Honorable Judge Latrone from April 12, 1999 through April 16, 1999. On April 19, 1999, Judge Latrone found him guilty of murder in the third-degree, recklessly endangering another person (REAP), and possession of an instrument of crime (PIC). He was sentenced to a term of 10 to 20 years imprisonment for murder, concurrent terms of 3 to 6 years imprisonment for REAP, and 2 ½ to 5 years imprisonment for PIC.

C. Direct Appeal

Mr. Nunez was represented by Mitchell Scott Struttin Esquire, in his direct appeal to the Pennsylvania Superior Court. In his appeal, he averred ineffective assistance of trial counsel for (1) failing to introduce character witnesses, (2) failing to call Angel Vasquez or Adrian Torres as witnesses at trial, and (3) failing to call petitioner as a witness at trial. In addition to the ineffectiveness claims, petitioner challenged the sufficiency of evidence to sustain a guilty verdict for the charge of murder in the third-degree. The Superior Court affirmed the judgment of sentence on November 9, 2000. See _Commonwealth v. Jose Nunez_, No. 2605 EDA 1999. Mr. Nunez filed an allocatur to the Supreme Court on November 21, 2000, which was denied on May 14, 2001. See _Commonwealth v. Jose Nunez_, No. 728 EAL 2000.

D. State Post-Conviction Proceedings

On March 5, 2002, Petitioner originally filed the instant *pro se* PCRA petition. There were 16 issues asserted in this petition. Due to Mr. Nunez's limited knowledge of the law, there were repetitious claims in his initial *pro se* petition. These claims can be reduced to ten allegations of ineffectiveness of counsel for various prejudicial inactions of trial counsel.

On August 19, 2002, David Belmont, Esquire, was appointed to represent Mr. Nunez before the PCRA Court. After review of the record and petitioner's petition, PCRA counsel claimed that Mr. Nunez's petition for relief lacked merit. On November 8, 2002, counsel filed an no-merit letter pursuant to _Commonwealth v. Finley_, 379 Pa. Super. 390, 550 A.2d 213 (1988). The PCRA Court then conducted its own independent review of the record and filings, and provided due notice to petitioner of its intention to dismiss petition. Mr. Nunez filed a *pro se* response to this notice, asserting that PCRA counsel failed to address all of his issues. On January 17, 2003, the PCRA Court then dismissed Mr. Nunez's PCRA Petition. He then appealed to Pennsylvania Superior Court and on July 8, 2004 the matter was remanded for appointed counsel to amend petition and address his claims. Thereafter David Rudenstein, Esquire, was appointed as new PCRA counsel. Counsel filed an Amended Petition on January 6, 2005 averring that the trial court erred in ruling that the defendant's character witnesses who would testify only as to the defendant's peacefulness could be cross-examined as to the defendant's prior drug trafficking operation denying him a fair trial and due process. On July 6, 2005, the court dismissed his petition without relief.

Mr. Nunez appealed the PCRA decision, which was subsequently affirmed by the Superior Court on September 8, 2006. See *Commonwealth v. Jose Nunez*, No. 2102 EDA 2005. On October 10, 2006, Mr. Nunez petitioned to the Supreme Court of Pennsylvania for allowance of appeal and was subsequently denied. This petition for Writ of Habeas Corpus relief follows.

III. Governing Habeas Corpus Principles

A. Exhaustion and Procedural Default

Mr. Nunez presents a number of constitutional claims, each of which were exhausted in state court on direct appeal or on post-conviction proceedings. Further, since all claims were properly raised at trial, post-conviction, and appellate levels, there has been no procedural default of any issue presented in this Petition.

B. Mr. Nunez's Right to an Evidentiary Hearing

In Mr. Nunez's Direct Appeal, he requested an evidentiary hearing on his claims of ineffectiveness of counsel for (1) failing to present character testimony on behalf of the defense at trial, (2) failing to interview Adrian Torres and Angel Vasquez and present their testimony, and (3) failing to present the defendant's testimony at trial. These requests were accompanied by affidavits to proposed witnesses, but in each instance, the state court arbitrarily denied a hearing.

Under AEDPA, 28 U.S.C. § 2254(e)(2) and Rule 8(a), Rules Governing § 2254 cases, federal habeas corpus hearings are required when the petition alleges facts that, if proved, entitle the petitioner to relief, e.g. *Hill v. Lockhart*, 474 U.S. 52, 60, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985); *Armienti v. U.S.*, 234 F.3d 823 (2d Cir. 2000), and, for reasons beyond the control of petitioner, the factual claims were not previously subject to full and fair hearing in state court. Murdoch v. Castro, 365 F.3d 699, 70 64 Fed. R. Evid. Serv. 248 (9th Cir. 2004)

The United States Supreme Court has expressly ruled that "a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault attributed to petitioner or petitioner's counsel." *Williams v. Taylor*, 529 U.S. 420, 431, 120 S.Ct. 1479, 146 L.Ed. 2d 435 (2000) (emphasis added). Thus, where the state courts deny hearing or does not permit introduction of relevant evidence, a federal habeas petitioner is entitled to a hearing in federal court. In *Thomas v. Varner*, 438 F.3d 491, 498 (3rd Cir. 2005), the Third Circuit made clear that a hearing is proscribed under 28 U.S.C. § 2254(e)(2) only if the petitioner had failed to develop the factual basis of a claim in the state court proceedings. There, as here, petitioner requested a state hearing, but was denied either a hearing or the opportunity to present relevant evidence. See also, *Wilson v. Beard*, 436 F.3d 653 (3rd Cir. 2005) (evidentiary hearing appropriate where request for hearing in state court was denied); *Guidry v. Dretke*, 397 F.3d 306, 322-24 (5th Cir. 2005), cert. Denied, 126 S.Ct. 1587 (U.S. 2006), (stating the grant of an evidentiary hearing even though a hearing had been held in state court.); *Bigelow v. Williams*, 267 F.3d 562, 2004 FED App. 0132P (6th Cir. 2004) (remaining for evidentiary hearing on issues not specifically addressed at state court hearing); *Murphy v. Johnson*, 205 F.3d 809, 815 (5th Cir 2000) (unless petitioner failed to develop the factual issues, pre-AEDPA rules regarding evidentiary hearings apply); *Carp v. Calderon*, 165 F.3d 1223, 1228-29 (9th Cir. 1999) (evidentiary hearing required on ineffectiveness of counsel claim as no hearing provided in state court).

Because Mr. Nunez is entitled to an evidentiary hearing on his claims, the issue of deference, if any, should be given to the limited "factual findings" made by the state courts must await the hearing. See 28 U.S.C. §§ 2254(d)(2) and 2254(e)(1). In this case, on most of the issues presented, the state courts did not make factual findings; indeed, the state courts denied evidentiary hearing on all of Mr.

Nunez's claims. Thus, on all of Mr. Nunez's claims of ineffectiveness of counsel, the Superior Court denied relief without making (or adopting from the trial court) any fact findings. Accordingly, this Court must first hold a hearing before it can properly decide any factual issues.

C. AEDPA Review Standards

The Superior Court's rulings rejecting the constitutional claims on the merits or by reason of lack of prejudice are subject to the review provisions of 28 U.S.C. § 2255(d)(1), under which the federal court may grant relief if the state court's adjudication:

(1) Resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

For habeas relief on the basis of an "unreasonable application of clearly established federal law" (28 U.S.C. § 2254(d)(1)), the test is not whether the facts are identical to any previous case, but whether the state court unreasonably failed to apply the clearly established constitutional principles to the particular facts of the case. See, e.g., Lockyer v. Andrade, 538 U.S. 63, 75, 123 S.Ct. 1166, 155 L.Ed. 2d 144 (2003), quoting Williams, 529 U.S. at 407; Gibbs v. Frank, 387 F.3d 268, 275-77 (3rd Cir. 2004). As the First Circuit observed: "There is no Supreme Court case directly on all fours, but AEDPA requires no such thing." White v. Caplan, 399 F.3d 18, 25 66 Fed. R. Evid. Serv. 626 (1st Cir. 2005), cert. Denied, 126 S. Ct. 478, 163 L.Ed. 2d 384 (U.S. 2005).

The deferential standard of § 22549d)(1) applies only to those legal issues actually adjudicated by the state courts. See, e.g., Holloway v. Horn, 355 F.3d 707, 719, (3rd Cir. 2004), cert. denied, 543 u.S. 976, 125 S.Ct. 410, 160 L.Ed. 352 (2004); Jermun v. Horn, 266 F.3d 257, 299-300 (3rd Cir. 2001). This principle is significant given the Superior Court's erroneous adjudication of Mr. Nunez's ineffectiveness of counsel claims and its failure to properly weigh the evidence thereby erroneously convicting him of murder with insufficient evidence.

D. The Standards for Claims of Ineffectiveness of Counsel

The standards for determining claims of ineffectiveness of counsel are well established. A petitioner must show that counsel's performance was deficient and that the deficiencies in performance prejudiced his defense. *Strickland c. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). Prejudice is established where "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." 466 U.S. at 694 (emphasis added). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. See also, *Woodford v. Visciotti*, 537 U.S. 19, 22, 123 S.Ct. 357, 154 L.Ed. 2d 279 (2002) (noting that *Strickland* had "specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered"); *Williams*, 529 U.S. at 406 (rejecting state court's attempt to engraft additional burden on habeas petitioner, rather than simply applying 'reasonable probability" standard); *Jacobs v. Horn*, 395 F.3d 92, 105, n. 8 (3rd Cir. 2005) (habeas petitioner need not prove "conclusively that deficiency of counsel would have led to different result); *U.S. v. Smack*, 347 F.3d 533, 540 (3rd Cir. 2003); *Jermvn*, 266 F.3d at 282 (noting that reasonable probability standard is not "a stringent one"); cf. *Dugas v. Coplan*, 428 F.3d 317, 328 (1st Cir. 2005) (fact that trial counsel was experienced and "generally competent" is not relevant).

There is an additional fundamental legal principle regarding ineffective assistance of counsel claims: after a reviewing court analyzes each claim of deficient performance to determine whether prejudice was established, if no single claim amounts to prejudice, the court must then assess the cumulative predjudicial impact of all deficient performance claims. See, e.g., Wiggins v. Smith, 539 U.S. 510, 534-36, 123 S.Ct. 2527, 156 L.Ed. 2d 471(2003) (totality of errors must be considered to properly determine prejudice)); Williams, 529 U.S. at 396-98 ("acts or omissions" must be considered in the aggregate); Daniels v. Woodford 428 F.3d 825, 834 (9th Cir.2002), as amended, (Feb. 22,2002); Humphreys v. Gibson, 261 F.3d 1016, 1021 (10th Cir.2001); Washington v. Smith, 219 F.3d 620, 634-35 (7th Cir.2000) (court must assess the "totality of the omitted evidence...rather than the individual errors"); Skaggs v. Parker, 235 F.3d 261, 267, 2000 FED App. 0415A (6th Cir.2000) (errors in penalty phase undermine confidence in the verdict). Because the stat rulings were factually imcomplete, this court must undertake the analysis on a de novo basis. See Jermvn, 266 F.3d at 299-300; Everett, 290 F.3d at 507-508.

IV. ARGUMENT

A. Petitioner was denied his 14th Amendment right to due process and equal protection under the law when he was convicted of Murder in the third degree where the evidence was insufficient to sustain this verdict.

Mr. Nunez's 14th Amendment right to due process of law was denied when the state convicted him of murder in the third degree absent sufficient evidence to sustain the conviction. In evaluating a challenge to the sufficiency of the evidence in accordance to Pennsylvania law, we must determine whether the trier of fact could have found that each and every element of the crimes charged was established beyond a reasonable doubt. The trier of fact cannot base a conviction on conjecture and speculation and a verdict which is premised on suspicion will fall even under the limited scrutiny of appellate review. Based on this standard, Mr. Nunez submits that the evidence is insufficient to sustain his conviction for third degree murder as the Commonwealth failed to prove his guilt of this crime charged beyond a reasonable doubt.

Pursuant to Pennsylvania Crimes Code, "aperson is guilty of criminal homicide if he intentionally, knowingly, recklessly or negligently causes the death of another human being." 18 Pa.C.S.A. §2501(a). "A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing." 18 Pa.C.S.A. §2502(a). an intentional killing is defined as "Killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing." 18 Pa. CS.A. §2502(d).

In Common law it has been established that malice aforethought is an essential and indispensable element of the crime of murder. Mullaney v. Wilber, 421 U.S. 684, 95 S.Ct. 1881, (U.S.Me. 1975) (emphasis added). It is this element of the crime of murder which was not met in the instant matter violating Mr. Nunez's right to due process of law.

"The presence or absence of malice marks the boundry which separates the (federal) crimes of murder and manslaughter." United States v. Serawop, 410 F.3d 656, 662 (10th Cir.2005) "Malice is not satisfied by killing with an intentional or reckless mental state.

Instead malice specifically requires committing the wrongful act without justification, excuse or mitigation." Id. at 669.

In this matter, the Commonwealth's evidence establishes that the killing of the victim was not attended by these factors ordinarily present in a murder case. While the evidence may be insufficient to establish murder in the third degree, it may, however, have supported a verdict of voluntary manslaughter.

The evidence presented at trial showed that at the time of the shooting, members of the victim's group were engaged in riotous conduct which included beating of the defendant's friends, definitely with fist, probably with broken bottles. Testimony clearly showed that members of the victim's group were out of control and may have been descending on the defendant. The defendant could reasonably have interpreted the situation as presenting a danger of death or serious bodily injury to himself and his friends. Mr. Nunez fired to either quell the crowd or to prevent the victim's group from further attacking him and his friends.

Had Mr. Nunez not fired a shot, members of the victim's group would, no doubt, have beaten Mr. Nunez or caused the death or serious bodily injury to his friends. The law of Pennsylvania does not require one to stand by helplessly while he is injured or killed by an assailant or harm is caused to others. See Commonwealth v. Fowlin, 551 Pa. 414, 710 A.2d 1130 (1998).

Clearly absent in this matter is any evidence of malice or Mr. Nunez's intent to cause serious bodily injury. The evidence is totally lacking to sustain a finding that Mr. Nunez acted with malice in shooting the victim necessary for a conviction of murder. At most, Mr. Nunez actions arise to voluntary manslaughter.

The Common law defines manslaughter as the unlawful killing of another without malice. Stevenson v. United States, 162 U.S. 313, 320, 16 S.Ct. 839, 40 L.Ed. 980 (1896) Today malice still distinguishes federal murder from federal manslaughter. Compare United Atates v. Lofton, 776 F.2d 918, 920 (10th Cir.1985)(articulating malice as element of both first and second degree murder, with 18 U.S.C.§1112 defining both voluntary and involuntary manslaughter as "without malice.").

Voluntary manslaughter is only available where the evidence shows that the defendant "acted in a state of passion sufficient to obscure his reason and that the passion was produced by reasonable and adequate provocation." State v. Brown, 836 S.W. 2d 530, 553 (Tenn. 1992). The only inquiry for the jury in deciding whether a homicide amounted to murder or manslaughter was the inquiry into heat of passion on sudden provication. State v. Lafferty, 309 A.2d 647, 664-665 (Me. 1973)

In order to determine whether the malice element was met by sufficient evidence we must establish a more comprehensive definition of the term "malice". Malice is not satisfied simply by killing with an intentional or reckless mental state; instead, malice specifically requires committing the wrongful act without justification, excuse, or mitigation. See 50 Am.Jur.2d homicides § 37(1999) ("[Malice[is said to include all those states and conditions of mind which accompany a homicide committed without legal excuse or extenuation.") Black's Law Dictionary 976 (8th ed. 2004) (defining "malice" as "intent", without justification or excuse, to commit a wrongful act.); 40 C.J.S. Homicide §33 (1999) ("Malice has been defined as consisting of the intentional doing of an wrongful act toward another without legal justification, excuse or mitigation.") The Supreme court has also described malice as "lack of provocation." Patterson v. New York, 432 U.S. 197, 216, 97 S.Ct. 2319, 53 L.Ed. 2d 281 (1977).

There was substantial evidence presented during trial to support Mr. Nunez's claim of inperfect self-defense resulting out of the heat of passion on sudden provocation. We will now examine the evidence presented which supports a verdict of voluntary manslauter rather than third degree murder.

During the course of the trial testimony was given by 5 of the victim's friends and family and 7 state officials on behalf of the Commonwealth. The Commonwealth presented testimony evidence of alleged confrontational statements by Mr. Nunez to bolster their claims of malicious intent. During direct examination, Commonwealth witness Mr. Pasquale Deccio testified that he heard Mr. Nunez say he was going "to kill nine niggers up in this place," (N.T. 4/13/99 pg. 74) Mr. John Rossano stated that Nunez said "I'm going to gat me somebody." (N.T. 4/12/99 pg 108.) and Mr. Francis Beato testified that he heard Mr. Nunez say that "9 niggers are going to get shot up in here if there's any problems." (N.T. 4/14/99 pg 12)

Upon cross examination the validity of these statements came into question. Both Mr. Rossano and Mr. Beato admitted that these alleged threatening remarks by Mr. Nunez were never mentioned in their initial statements to investigating officers. (N.T.4/12/99 pg. 138, 4/14/99 pg. 43) Mr. Deccio testified that he had 25 beers and some liquor which impaired his ability to observe.(N.T. 4/13/99 pgs. 94, 110) Mr. Rossano and Mr. Deccio stated that there was loud music playing and alot of people in the hallway talking thereby making it difficult to hear anything. (N.T. 4/12/99 pg. 125 4/13/99 pg. 77) In addition Mr. Rossano contradicted his original testimony when he said he could not hear what Mr. Nunez and Mr. Cieri were saying because it was too loud. (N.T. 4/12/99 pg. 92) Later he would testify that he heard Mr. Nunez talking about "gatting" somebody while with Mr. Cieri. (N.T. 4/12/99 pg. 108) These inconsistant statements by Commonwealth witnesses can not sufficiently satisfy the malice element of murder beyond a reasonable doubt.

According to Commonwealth witnesses' own testimony, at very least Billy Impagliazzo, Butchie Grandelli, Eddie DePesso, Pasquale Deccio, Greg Rendelli and Louis Cieri were fighting.(N.T. 4/13/99 pgs. 17,21,79,81,82; 4/14/99 pg 17) Clearly Mr. Nunez and his friends were out numbered in this altercation. Mr. Deccio not only testified that the victim's group started the physical altercation, but he and Mr. Grandelli were beating up one of Mr. Nunez's friends. (N.T. 4/13/99 pgs. 79,81,82,108,109) He also stated that bottles were broken during the altercation. (N.T. 4/13/99 pg. 108)

To further corroborate Mr. Nunez's defense that he was in fear of serious bodily injury or death, Police Officer Kenneth Kimchuk testified that there was blood on the outside of room 513's door and Mr. Nunez exited the room requesting medical attention for himself and his friends. (N.T. 4/12/99 pg.66-68) Officer Kimchuk also mentioned the presence of broken bottles in the hallway. (N.T. 4/12/99 pg. 62) Officer Carl Rone testified that blood was on the gun and collected from various surfaces in Room 513. (N.T. 4/15/99 pgs. 7, 17-18, 23) Forensic scientist Ronald McCoy verified receipt of this blood evidence and that there was blood on the right sleeve of Mr. Nunez's jacket. (N.T. 4/15/99 pg 27, 31) There were only two men and two women in Room 513, (N.T. 4/12/99 pg. 68) one of whom was Mr. Nunez. According to this physical evidence and the unbiased testimony of state officials, it is likely that one or both of the men in the room had sustained bodily injury during this altercation. No one in room 513 had any contact with the victim after he was shot; therfore, the blood had to be from one or both of the injured men.

All of the Commonwealth eye witnesses repeatedly contradicted themselves and each other on the witness stand and in their intial statements. The only consistant testimony was that the victim's group were all participating in an under-age New Year's drinking party, there was an altercation between the victim's group and Mr. Nunez's group in which Mr. Nunez and his friends were out numbered, and Mr. Nunez fired two shots into the crowd without aiming (N.T. 4/12/99 pg.95) fatally wounding William Impagliazzo. This evidence supports a verdict on voluntary manslaughter out of the heat of passion on sudden provocation rather than murder in the third degree.

The element of malice is negated if one kills out ot fear of imminent peril. Middleton v. McNeil, 124 S.Ct. 1830, 1831, 541 U.S. 433, 434 (U.S.2004) quoting In re Chistian S., 7 Cal. 4th 768, 773, 872 P.2d 574,576 (1999) Where that fear is unreasonable (but nevertheless genuine), it reduces the crime from murder to voluntary manslaughter a doctrine known as "imperfect self-defense."

In homicide cases, Maine sought to presume malice from the fact of an intentional killing alone, subject to the defendant's right to prove he had acted in the heat of passion. This was so even though "the fact at issue...-the presence or absence of heat of passion on sudden provocation- has been, almost from the inception of Common Law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide." Id Mullaney at 696, 95 S.Ct. 1881. Mullaney, "held that a state must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense." Patterson, 432 U.S. 197 at 215 (1977).

In a criminal trial, the state must prove every element of the offense. See Sandstrom v. Montana, 442 U.S. 510, §20-521, 99 S. Ct. 2450, 61 L.Ed.2d 39 (1979). In light of the evidence presented at trial and established federal law, Mr. Nunez should be granted relief due to the state court's decision which was contrary to clearly established Federal Law and based on unreasonable determination of the facts in light of the evidence presented. The incontrovertible evidence in this matter show that Mr. Nunez and his friends were out numbered and under attack by the victim's group of intoxicated teens. Mr. Nunez and his friends were injured in this physical altercation initiated by the victim's group. Under these circumstances, there is genuine, whether unreasonable or reasonable, fear of imminent peril. Therefore, the element of malicious aforethought has not been satisfied byond a reasonable doubt in violation of Mr. Nunez's Constitutional right to due process and equal protection under the law.

B. Petitioner was denied his 6th Amendment right to counsel when trial counsel provided ineffective assistance by failing to call Angel Vasquez and Adrian Torres as witnesses at trial.

Not only was Mr. Nunez's verdict in this matter based on insufficient evidence, he suffered additional prejudice when counsel did not call available witnesses to testify to the events surrounding the death of Mr. Impagliazzo. Several witnesses were available to testify, including Lisa Tomesetti, Tracy Cassolero, Danielle McBride, Adrian Torres and Angel Vasquez. Counsel presented no witnesses at all to substantiate Mr. Nunez's defense.

"It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exist regardless of the accused admission or statement to the lawyer of facts constituting guilt of the defendant's stated desire to plead guilty." 1ABA Standards for Criminal justice 4-4.1(2ded. 1982 supp) "We long have referred to these ABA standards as guides to determine what is reasonable." Wiggins v. Smith, 539 U.S at 524, 123 S.Ct. 2527(quoting Strickland v. Washington, 466 U.S. at 688, 104 S.Ct. 2052)

There were numerous witnesses willing and available to testify on behalf of the defendant at trial. Testimony at trial showed that Mr. Nunez was in the company of numerous individuals, including Adrian Torres and Angel Vasquez, when he attended a party at the Travelodge Hotel on January 1, 1997. (N.T. 4/12/99 pg. 88; 4/13/99 pg. 74-75; 4/14/99 pg. 12) Despite this, trial counsel failed to interview or present the testimony of either Torres or Vasquez.

Following the incident, homicide detectives interviewed Torres. A copy of Torres' statement to the police was provided to trial counsel as part of pretrial discovery. Torres was re-interviewed by Richard T. Strohm, an investigator working on behalf of appellate counsel, Mitchell Strutin, esquire, and an affadavit was obtained. In Torres' Affadavit he indicates that he was present at the Travelodge Hotel on January 1, 1997. He was also present when an altercation took place. between the victim's group and members of Mr. Nunez's group. (appendix, R.R. at 20a-30a)

Torres' Affidavit further states that he attended a party at the hotel, the group having been invited by a friend of Mr. Nunez. When he entered the elevator, he observed "white guys" with cases of beer. While on the elevatore to the fifth floor party, one of the "white guys" said, "what the hell are these spics doing here?" Torres' friend Angelo Vasquez grabbed a drink out of one of the "white guys" hands and pushing and shoving commenced. After Torres banged on the elevator wall, the situation calmed down. (R.R. at 25a-30a)

Torres states further that he was the first to come off of the elevator. Mr. Nunez and the other members of his group ran off of the elevator and into one of the rooms. A group of "white guys" chased after Mr. Nunez and the other members of his group. When the "white guys" passed by Torres, they hit him in the head with a bottle and punched him. He was unable to get these "white guys" off of him and he fell to the floor. The "white guys" continued to punch and kick him while he was on the floor. Another group of "white guys" attempted to break into the room to which Mr. Nunez and members of his group ran. While Torres was on the floor, he heard two or three gunshots. Everyone scattered as a result and Torres ran into one of the rooms, locked the door and waited for the police to arrive. (R.R. at 25a-30a)

As a result of Torres being hit with bottles, fist and other objects by at least ten of the "white guys," he was bleeding from his face, eyes and head. He was taken to the hospital for treatment. During the incident, he also saw Angel Vasquez bleeding from his lip. (R.R. at 25a-30a)

Torres attest further that the "white guys" started the fight. At no time did Mr. Nunez make any threats to anyone in attendance at the party. Mr. Torres was, in fact, taken to the hospital following the incident and treated there for injuries received during the incident. (R.R. at 25a-31a)

Torres also stated the he did not testify at Mr. Nunez's trial but was available to do so had he been called as a witness. (R.R. at 25a-30a)

As previously stated, Vasquez was interviewed by homicide detectives. (RR at 47a-50a). A copy of Vasquez's statement to the police was provided as part of pretial discovery. On April 11, 2000, appellate counsel contacted Vasquez by telephone and interviewed him. At that time Vasquez resided in Easton, Pennsylvania.

Vasquez informed appellate counsel that the contents of his statement to homicide detectives were true and accurate. His statement indicates that on January 1, 1997, he accompanied his friends to a party in south Philadelphia. Mr. Nunez informed him that they had been invited to the party at a hotel by some girls. When they arrived at the hotel, they met the girls in the lobby. They took the elevator to the fifth floor where the party was. There were eight to ten "white guys" on the elavator. One of the "white guys" hit "Luis" in the head with a beer while on the elevator.

Vasquez's statement also states that after he arrived on the fifth floor, there were more "white guys" present and fighting broke out. Vasquez and Torres became separated from their friends and they engaged in a fight with the "white guys". He was able to enter one of the rooms and locked the door. Torres entered the room sometime after Vasquez entered. Aminute or two later, Vasquez heard the sound of two gunshots. He then locked the door and waited in the room for the police.(RR at 47a-50a)

Vasquez states further that he was hit in the face with a bottle. Both Torres and "Luis" also sustained injuries. He was not aware that Mr. Nuñez was in possession of a gun. At no time did he hear Mr. Nunez utter any threatening statements. (R.R. at 47a-50a)

Vasquez was, in fact, taken to the hospital following the incident and treated for injuries received during the incident. (R.R. at 51a)

Torres and Vasquez's statement and testimony would have further brought question to the Commonwealth witnesses' shakey assertions that Mr. Nunez made threatening comments prior to the shooting. This was the testimony used to convict Mr. Nunez of Murder in the third degree rather than voluntary Manslaughter. Both of their testimony would have corroborated that one of the victim's party iniciated the altercation. (N.T. 4/13/99 pg. 79,81,82,108,109) All of the information presented by these men would have assisted counsel in his "imperfect self-defense" argument. Therefore, there was no rational reason why he did not interview these to men and present them as witnesses at trial knowing the content of their prior statements.

In Pennsylvania Law which is applicable to this matter we must remember that,

> "In a case where virtually the only issue is the creditibility of the Commonwealth's witness versus that of the defendant, failure to explore all alter- natives available to assure that the jury heard testimony of a known witness who might be capable of casting a shadow upon the Commonwealth's witness' truthfullness is ineffective assistance of counsel."
> Commonwealth v. Twiggs, 460 Pa. 105, 331 A.2d 440 (1975)

In United States v. Plattner, 330 F.2d 271, the Court of Appeals for the Second Circuit emphasized that the Sixth Amendment grants the accused the rights to confrontation, of compulsory process for witnesses in his favor, and of assistance of counsel as minimum procedural requirement in federal prosecutions. Because these rights are basic to our adversary system of criminal justice, they are part of the due process of law that is guaranteed by the Fourteenth Amendment to defendants in the criminal court of the States. The right to notice, confrontation, and compulsory process, when taken together guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American Justice--through the call and intertogation of favorable witnesses, the cross-examination of adverse witnesses, an the orderly introduction of evidence. In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it. See California v. Green, 399 U.S. 149, 176 90 S.Ct. 1930, 1944, 26 L.Ed.2d 489 (Harlan, J., concurring).

This constitutional right to make a defense was obsured by trial counsel's deficient representation when he fail to call favorable available witnesses on behalf of Mr. Nunez. It is this specific error and omission that we focus this claim of ineffective assistance of counsel. In accordance to the ineffectiveness of counsel standard set forth earlier, Mr. Nunez was prejudiced in this matter in that "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Strickland, 466 U.S. at 694 (emphasis added)

C. Petitioner was denied his 14th Amendment right to due process and equal protection under the law when the State Courts ruled that a defense character witness could be cross-examined about the defendant's past drug trafficking conviction even though the defendant had proffered good charcter in the form of peacefulness only an where a prior drug trafficking conviction should not be held to rebut that trait of character.

In addition to the previously argued ineffectiveness claims, Mr. Nunez was denied effective appellate counsel when counsel failed to raise the Motion Court's error in allowing cross-examination of defense character witnesses concerning an irrelevant past drug trafficking conviction.

The record clearly reflects that the defense was relying on reasonable doubt as a defense; moreover, the character witnesses could have helpedto establish that Mr. Nunez, as a person of good character, did not act with malice. As part of that defense, the defense was ready, willing and able to offer a number of character witnesses, who as proffered would have testified to Mr. Nunez's good character for the trait of peacefulness. However, the Comonwealth made it known that it would seek to call witnesses to rebut hat trait and would seek to cross-examine the character witnesses as to whether they knew Mr. Nunez had a conviction for drug trafficking. A Motion in Limine was then argued before the Honorable Judge Legrome Davis on April 15, 1999. The Court ruled that it would permit the cross-examination of character witnesses on Mr. Nunez's single conviction for drug trafficking, claiming it was a violent offense (N.T. Motion Hearing 4/15/99, pg.37)

A trial court's discretion to control cross-examinations of character witnesses is disturbed only upon a showing of prejudical abuse of discretion. United States v. Adair, 951 F.2d 316, 319-20 (11the Cir. 1992). The Government must have a good faith basis for instances of conduct inquired about, and the instances must be relevant to the character triats at issue in the case. Id at. 319. Rule 405(a) of the Federal Rules of Evidence sate, "on cross-examination, inquiry is allowable into relevant specific instances of conduct" after opinion or reputation evidence has been offered on direct examination.

In the instant matter, the proffered trait was "peacefulness". The proposed cross-examination with regard to Mr. Nunez's conviction for drug trafficking should have been prohibited because drug trafficking is not a violent offense and would not impeach or rebut the testimony offered by the witness, to wit, that Mr. Nunez was a peacable person. While drug trafficking can be a violent business (and this is what apparaently prompted Judge Davis to rule for the Commonwealth), there is no case law that would support the Commonwealth's position that drug trafficking is inherently a violent offense or is so classified. Moreover, and as the Motion in Limine hearing transcripts reflect, Mr. Nunez was never charged with any attendant crime of violence and was never charged with possessing a weapon during a drug trafficking offense. Whether of not drug trafficking is a crime of violence need not be guess that as the State legislature has told us that it is not. At 42 Pa.C.S.A. § 9714, the State Legislature passed laws dealing with "sentences for second and susequent offenses". The mandatory minimums applied to offenses that were deemed to be "crimes of violence." At subsection (g), the State Legislature defines crime of violence. the statute says:

> "As used in this section, the term "crime of violence" means murder in the third degree, voluntary manslaughter, aggravated assaut...rape, involuntary deviate sexualt intercourse, aggravated indecent assault, incest, sexual assault, arson, kidnapping, burglary of a structure adapted for overnight accommodation in which at the time of the offense any person is present, robbery...or robbery of a motor vehicle, or criminal attempt, criminal conspiracy or criminal solicitation to commit murder or any of the offenses listed above or an equivalent crime under the laws of this Commonwealth in effect at the time of the commission of that offense or an equivalent crime in another jurisdiction."

The State Legislation passed a sweeping Mandatory Minimum Sentencing Act with regard to repeat offenders who commit crimes of violence. The State Legislat're, which made the law, included a host of crimes as listed above. They did not include Possession with the Intent to Deliver (PWID) a controlled substance, referred to in this matter as "drug trafficking." They would have included it if they wanted to. The State's Lower Courts cannot include it where the State Legislature did not.

In the instant matter, and while violence may attend to some drug dealing, it is not inherently violent to stand on a corner and to peddle drugs. It is morally repugnant; but not inherently violent

For the reasons listed above, the Trial Court erred when it ruled on the behalf of the Commonwealth. This prevented the defense from offering its character witnesses. This was not a harmless error. Evidence of good character is substantive, not mere make-weight evidence, and may, in and of itself, create a reasonable doubt of guilt. As in this instance, character witnesses to the the peacefulness of Mr. Nunez would have cast reasonable doubt to the malice aforethought element required to convict him of third degree murder. This would have led the Trial Court to find Mr. Nunez guilty of some lesser offense, whether it have been voluntary manslaughter or perhaps Involuntary Manslaughter. Volutnary manslaughter, under all the circumstatnces could have been a rational verdict given the passion that all of the young men seemed to have had which was flowing as freely as the beer was being poured that New Year's morning.

V. CONCLUSION

In a case that was plagued by inconsistant Commonwealth witness testimony, the numerous and re-enforcing errors in the state proceedings deprived Mr. Nunez of his constitutional right to a fair trial. Viewed individually or collectively, these violations caused overwhelming prejudice and allowed the trier of fact to convict Mr. Nunez, not because of the facts surrounding the chaotic events of that morning, but instead because he was a "bad person". This writ of habeas corpus should be granted.

Respectfully submitted,

2/25/08

Petitioner, Jose Nunez pro se

APPENDIX

INVESTIGATION INTERVIEW RECORD	PHILADELPHIA POLICE DEPARTMENT HOMICIDE DIVISION	CASE NO. H97-1 / INTERVIEWER Det. Pitt # 9004

NAME	AGE	RACE	DOB
Adrian Torres	19	W/H/M	6-7-77

ADDRESS	APARTMENT NO.	PHONE NO.
1516 Green Street	Apt. A	

NAME OF EMPLOYMENT/SCHOOL: National Education Center/ Sweet Market, 1616 W. Ridge Ave

ADDRESS OF EMPLOYMENT/SCHOOL: 3440 Market Street | DEPARTMENT:

DATES OF PLANNED VACATIONS: N/A

DATES OF PLANNED BUSINESS TRIPS: N/A

NAME OF CLOSE RELATIVE: Camilla Torres (mother)

ADDRESS: Same Address | PHONE NO.: Same

PLACE OF INTERVIEW	DATE	TIME
Homicide Division, room # 104, PAB, 8th. & Race St.	1-1-97	7:50AM

BROUGHT IN BY	DATE	TIME
Uniform Police, from Graduate Hospital	1-1-97	7:30AM

WE ARE QUESTIONING YOU CONCERNING: The Shooting Death Of Billie Inpagliazzo on 1-1-97, at 2015 Penrose Ave, 1:40AM

WARNINGS GIVEN BY: | DATE: | TIME: AM PM

ANSWERS (1) (2) (3) (4) (5) (6) (7)

Q. Adrian are you known by any other names or nicknames?

A. No

Q. Did you know the male who was shot and killed this morning at 2015 Penrose Ave?

A. No

Q. Did you know the male who did the shooting?

A. Yes, Jose. I used to go to school with him in the 7th. & 8th. grade.

Q. Was you with Jose before the shooting took place?

A. Yes, we were all together, Jose, Angel, Miguel and his brother had been together since 12:30AM. I met up with Jose over Angel's house.

Q. What is Jose's last name and address?

A. I don't know his last name, but he lives in the 1700 block of North St.

Q. Adrian I want you to go on in your own words and tell me what happen, from the time that you arrived at the hotel at 2015 Penrose Ave?

RECORD ☐ Yes ☐ No | CHECKED BY

REVIEWED BY

adrian torres 20a

75-483 (Rev. 7/82)

INVESTIGATION INTERVIEW RECORD

CONTINUATION SHEET

CITY OF PHILADELPHIA

POLICE DEPARTMENT

NAME	PAGE	CASE NO.
Adrian Torres 19 W/H/M	2	H97-1

A. Me, Angel, Jose, Miguel and his brother all went to the hotel, got on the elevator to the 5th. floor. As we exited the elevator and walked to our left somebody tripped somebody. An argument broke out, we started arguing and somebody came and pushed Angel. Then everybody started fist fighting, and somebody hit me with a bottle on my head. We all ran to the room, but didn't make it to the room. So Jose came out to see if he could help me, So Jose came out firing the gun, and afterward I ran into the room and closed the door. I told Jose to call the cops and tell the what had happen. And he didn't listen, he just stood and waited for the cops to come. When the cops came they searched me and Angel, and told us to head down to the lobby and get into the cop's car. Then they took us to the hospital for treatment.

Q. How many times did Jose fire the gun?

A. I heard two shots.

Q. At the time Jose fired the gun, what was you at?

A. Down the hallway getting beat up by another group of white males.

Q. Did you see Jose fire the gun?

A. No, because I was down the hallway on the floor, and the hallway goes in a circular shape.

Q. How do you know that Jose fired the gun?

A. Because when I got back into the room where he was at, I askedhim what had happenbecause I had heard the gunshots. He told me that he shot the guy because they approached him. He said that the guys that were at the party were trying to grabbed him. He told me that he had shot the gun at the guys because he was looking for me.

21a

Adrian Torres

75-483A

INVESTIGATION INTERVIEW RECORD
CONTINUATION SHEET

CITY OF PHILADELPHIA
POLICE DEPARTMENT

PAGE 3 CASE NO. H97-1

NAME Adrian Torres 19W/H/M

Q. Who did the gun belong to?

A. I don't know, I didn't even know he had the gun on him.

Q. Describe the gun to me?

A. It looked like a small caliber gun, maybe a 380, black automatic.

Q. Who were the girls inside the hotel room?

A. I only know one of the girls, her name is Natily. She use to go out with my friend Musa.

Q. How did you get to the room when you were being beat up?

A. I got up from the foor and ran to the room from down the hallway. I seen Jose go into the room as I was running up.

Q. As you were running up to the room, did you see any white males outside of the door where Jose was at?

A. As I was running to the room, they all were scattering coming towards me.

Q. What did the argument start over?

A. Somebody tripped somebody. I seen this W/M, getting up off the floor. He approached Jose, and Jose said look we didn't come her to fight. So one of the guys swung and hit Angel with a bottle on the chin. That is how it all started.

Q. Did anyone else have a gun, other than Jose.

A. No

Q. Describe Jose to me?

A. He is about 5'5" tall, close cut beard, with a mustache, short black hair, kind of stocky, wearing light blue jeans, gray shirt, white sneakers, tan puffy jacket, about 19 going on 20.

Q. Is there anything else you like to add to this statement?

A. No

22a

75-483A

Adrian Torres

INVESTIGATION INTERVIEW RECORD

PHILADELPHIA POLICE DEPARTMENT HOMICIDE DIVISION

CASE NO. H97-1

INTERVIEWER Loby #743

NAME Angel Vasquez

AGE 19

RACE H/m

DOB 2-25-77

ADDRESS 1711 Mt. Vernon ST.

APARTMENT NO. 1st Flr

PHONE NO.

NAME OF EMPLOYMENT/SCHOOL Cirminex Corp

SOC. SEC. NO. 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

ADDRESS OF EMPLOYMENT/SCHOOL Norristown Pa

DEPARTMENT Re'lamping

PHONE NO.

DATES OF PLANNED VACATIONS

DATES OF PLANNED BUSINESS TRIPS

NAME OF CLOSE RELATIVE

ADDRESS

PHONE NO.

PLACE OF INTERVIEW PAB Rm # 104

DATE 1-1-97 TIME 7 50 AM PM

BROUGHT IN BY Police

DATE TIME AM PM

WE ARE QUESTIONING YOU CONCERNING Shooting death of Billie Impagliazzo

WARNINGS GIVEN BY

DATE TIME AM PM

ANSWERS

(1) (2) (3) (4) (5) (6) (7)

Q. Are you known by any other names?

A. No

Q. I want you to go on in your own words, & tell what happened tonight?

A. I was hanging out with Adrian all day. When we got back to the neighborhood, we ran into Gonzo, Luis and Miguel. They told us about a South Phila party. Gonzo said that there were some girls down there inviting us to the party.

We got into Adrian's car and drove to the hotel.

RECORD ☐ Yes ☐ No

CHECKED BY

47a

REVIEWED BY Angel Vasquez

75-483 (Rev. 7/82)

INVESTIGATION INTERVIEW RECORD
CONTINUATION SHEET

CITY OF PHILADELPHIA
POLICE DEPARTMENT

NAME Angel Vasquez | PAGE 2 | CASE NO. 497-1

A I guess this was around 12:30 AM. When we got to the hotel, Gonzo talked to these two girls in the lobby.

We got into the elevator to go up to the 5th floor with them. There was maybe 8-10 white guys on the elevator going up too.

On the way up one of the white guys hit Luis in the head with a beer bottle. It was like just as the elevator stopped on five, Luis got hit.

When the doors opened there was more white guys out there and the fighting broke out. Me & Adrian got separated from the other three guys. Me & Adrian were fighting the guys in the hallway.

Me and Adrian got ourselves into somebody's room and we locked the door. We were the only two in the room. Then maybe a minute later I heard about 2 shots.

I opened the door and everybody was running and scattering. I closed and locked the door again until the cops came. When the cops came, they sent us downstairs.

48a

Angel Vasquez

75-483A

INVESTIGATION INTERVIEW RECORD
CONTINUATION SHEET

CITY OF PHILADELPHIA
POLICE DEPARTMENT

NAME: Angel Vasquez | PAGE: 3 | CASE NO. 497-1

Q. When the fight broke out on the fifth floor was everybody just after you fire?
A. No, everybody was fighting everybody. The whole place was fighting.

Q. Did you know that Gonzo had a gun?
A. No.

Q. Who is Gonzo?
A. His real name is Jose Nunez.

Q. How did you suffer your injuries to your face?
A. Somebody hit me with a bottle.

Q. During the fight did you hear anyone say "I'm going to kill me those 9 niggers"?
A. No

Q. Do you know the girls that invited you to the party?
A. No, Jose (Gonzo) knew them.

Q. Did you and Adrian get into the room at the same time?

Angel Vasquez

49a

75-483A

INVESTIGATION INTERVIEW RECORD
CONTINUATION SHEET

CITY OF PHILADELPHIA
POLICE DEPARTMENT

NAME Angel Vasquez | PAGE 4 | CASE NO. H97-1

A. No, he got in a little later, I got in the room first. Maybe a couple of seconds later he got in that's when I heard the shots.

Q. Did Luis suffer any injuries?
A. A lump on his head

Q. Does Adrian have any injuries?
A. His eye is black, his head is scratched and swollen.

Q. Does Gonzo have any injuries?
A. I don't know, I haven't seen him since I got off the elevator.

Q. Does Miguel have any injuries?
A. I didn't see any.

Q. Did you have any weapons?
A. No.

Q. Can you read & write English?
A. Yes

50a

Angel Vasquez

75-483A